

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1209
1029

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

SANTOS PETRUCELLI, :

Appellant. :

-----X

Docket No. 77-1209

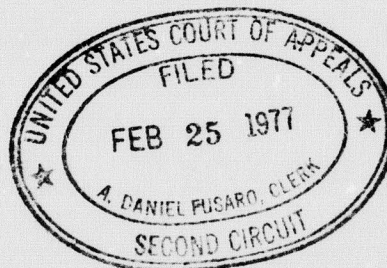
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ON APPEAL FROM A CONVICTION
OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF FOR
APPELLANT SANTOS PETRUCELLI

HOWARD L. JACOBS, P.C.
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HOWARD L. JACOBS
DONALD E. NAWI
Of Counsel



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TABLE OF CONTENTS*

	<u>Page</u>
Docket Entries	A-1
Indictment	A-4
Charge of the Court	A-6

* No opinion of the district court is relevant to the appeal issue.

CRIMINAL DOCKET - U.S. District Court

PETRUCELLI, SANTOS

F:9 4-17-76

04 14	76	0371	01
01			001

OFFENSES CHARGED	ORIGINAL COUNT
Assult of U.S. Officer. Attempt to interfer with admin. of internal revenue laws.	

ORIGINAL COUNTS ↓
of internal

[illegible]

SUPERSEEDING COUNTS

APREST	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began 4-5-76	High Risk Date Information 4-14-76	Trial Set For	Your Dire
Summons Served	Indict. Waived	1st Plea JNG <input type="checkbox"/> G <input type="checkbox"/> NOL	Trial Began
First Appearance	In Charging X 8-13-76	Final Plea G Plea W/Drawn	Trial Ended

SENTENCE

Number of Charges

_____ Charges

_____ Acquitted

_____ Dismissed

_____ All Charges

_____ Dismissed

WOP WP

MAGISTRATE					
Search Warrant Issued Return Issued Summons Served	DATE	INITIAL/NO.	INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR <input type="checkbox"/> REMOVAL <input type="checkbox"/> HEARING	INITIAL/NO.	OUTCOME
			<input type="checkbox"/> WAIVED <input type="checkbox"/> NOT WAIVED <input type="checkbox"/> INTERVENING INDICTMENT	Tape Number	<input type="checkbox"/> HELD FOR 60 DAYS PROCEEDING IN THIS COURT <input type="checkbox"/> HELD FOR 60 DAYS PROCEEDING IN DISTRICT COURT
	Arrest Warrant Issued				
	COMPLAINT				
OFFENSE (In Complaint)					

ATTORNEYS

Joseph Hallinan
~~Howard Jacobs~~

Howard Jacobs
401 CONWAY - Suite 1902
N.Y. N.Y. 10013

1394
431-3710

DATE	DOCUMENT NO.	PROCEEDINGS	EXCLUDABLE DELAY
			(A) (B) (C) (D)
4-14-76	✓	Filed indictment.	
4-15-76		76 Cr Santos Petrucelli (Jail) Deft. (Atty. present pleads not guilty. Motion for reduction of bail set by Magistrate at \$10,000 bail. Motion granted. Court fixes bail at \$10,000 P. R. B. secured by \$200.00 cash. Deft. continued remanded in lieu of bail. Case assigned to Judge Werker.	
5-3-76	/	Filed order--ORDERED that Dr. Gurston Goldin, MD be employed to observe deft. ; ORDERED that reasonable costs not to exceed \$150.00 be paid to said doctor and that the doctor submit to the court a report as to his findings. Werker, J. (consented to) m/n	

(see over)

Docket Entries A 2

DATE	IV PROCEEDINGS	LETTER CODE
4-30-76	PTC held. order is signed for psychiatric examination. Awaiting report. Werker, J.	
5-7-76	Filed temporary commitment dated April 5, 1976.	
5-7-76	Filed the following papers recd. from the office of Mag. Hartenstine: docket sheet; complaint filed on 4/2/76; disposition sheet; warrant of arrest dated 4/2/69 unexecuted unexecuted and warrant of arrest dated 4/2/76 with marshal's return dated 4/5/76 and CJA copy # 5 appointing C. Joseph Hallinan of 20 E. 46 St, NYC 10017 as defts. atty.	
6-9-76	Filed CJA copy # 2 authorizing payment to Gurston Goldin, M.D. of 166 E. 63 St, NYC 10021 for expert services in the amt. of \$150.00 on 5/18/76. Orig. mailed to AO, Wash., DC for payment.	
6-9-76	Filed CJA copy # 5 authorizing payment to Gurston Goldin for expert services. Werker, J.	
4-15-76	Filed appearance bond in the amt. of \$10,000 secured by \$200.00 cash. (receipt # 68933)	
6-30-76	PTC held. Trial date set for Aug. 24, 1976 at 2pm in Rm. 2704 and indictment is amended to read, "unlawfully, wilfully and knowingly" after "the deft.". Werker, J.	
8-13-76	Filed indictment, referred to Judge Werker related and superseding 76 Cr 371 pursuant to Speedy Trial Act Superseding indictment is to retain the same number. Goettel, J.	
8-25-76	Deft. and Atty. Havara Jacobs present. Deft. inters "not Guilty" Plea. Bail Cont'd as fixed in the amount of \$10,000 P.R.B. sec. by \$200 Cash and continue under supervision of pre-trial service. Trial Jury to commence at 11:00 a.m.	
8-25-76	Trial continued and concluded. Deft. found "Guilty" on Count 1 N/G on Ch. 3. Pre-Sent. Inv. Ordered Deft. to surrender Passport to U S. Atty's Office Date of Sentence Sept. 23, 1976 at 4:30 P.M. Werker, J.	
9-21-76	Filed JUDGMENT (atty. Howard Jacobs, present)--the deft. is hereby committed to the custody of the Atty. General or his authorized representative pursuant to Title 18, USC Section 4205(d) for study and report and recommendations. This commitment deemed to be for maximum sentence prescribed by law, pursuant to Title 18, Section 4205(c). The results of such study together with any recommendations which the Director of Prisons believe would be helpful in determining the disposition of the case, shall be furnished to the court within THREE(3) MONTHS. Werker, J. (copies issued)	
9-17-76	Bench warrant ordered. Defts. bail to be forfeited if deft. does not surrender by 9/20/76. (minutes sealed) Duffy, J.	
09-17-76	B/W issued.	
9-29-76	Filed one sealed envelope ordered sealed and impounded and placed in vault in cashier's office. (envelope contains exhibits filed in court on 9/17/76, etc.) Duffy, J.	

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

D. C. 109 Criminal Continuation Sheet

RKM:ee
n-2453

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
- v - : INDICTMENT
SANTOS PETRUCELLI, : 76 Cr.
Defendant. :
-----X

COUNT ONE

The Grand Jury charges:

On or about the 18th day of March, 1976, in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service, who was acting in an official capacity under Title 26 of the United States Code, and by threats of force endeavored to obstruct and impede the due administration of the income tax laws under Title 26 of the United State Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that "the blacks" were going to get Revenue Officer Joseph Tacopina and asked Revenue Officer Tacopina in substance whether he (Mr. Tacopina) would like a punch.

(Title 26, United States Code, Section 7212(a).)

COUNT TWO

The Grand Jury further charges:

On or about the 18th day of March, 1976 in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service acting in an official capacity under

RKN:ee
n-2453

Title 26 of the United States Code, and by threats of force endeavored to obstruct or impede the due administration of the income tax laws under Title 26 of the United States Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that if the United States government did not stop harrassing people in South America and Mexico, a bomb would be placed in the Internal Revenue Service building at 120 Church Street, New York, New York.

(Title 26, United States Code, Section 7212(a).)

COUNT THREE

The Grand Jury further charges:

On or about the 31st day of March, 1976 in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate, and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service who was acting in an official capacity under Title 26 of the United States Code, and by threats of force endeavored to obstruct and impede the due administration of the income tax laws under Title 26 of the United States Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that he carries a gun and that Revenue Officer Tacopina was going to pay with blood for collecting taxes from the defendant.

(Title 26, United States Code, Section 7212(a).)

Foreman

ROBERT B. FISKE, JR.
United States Attorney

CHARGE OF THE COURT

119

1
2 Werker, J.: Madam Forelady and ladies and
3 gentlemen of the jury: Now that the evidence is all in and
4 counsel have summed up their respective contentions, the time
5 has come for you and I to perform our respective functions
6 in the administration of justice in this case.

7 As I stated to you at the outset, it is my duty
8 to instruct you as to the principles of law to be followed
9 and it is your duty to accept those instructions as they are
10 given by me and apply them to the evidence in this case.

11 The indictment against this defendant is not
12 evidence and it does not carry with it any presumption of
13 guilt. It is merely a means by which the defendant and the
14 jury are informed of the nature of the charges or accusations
15 and the means of bringing the defendant to trial.

16 The defendant in this case has pleaded not
17 guilty and by that plea has put in issue each of the elements
18 of the charge made against him.

19 You may not give any weight whatever to the fact
20 that an indictment has been returned against the defendant.
21 It is your duty to determine the facts as derived from your
22 consideration of the evidence in this case and then applying
23 the principles of law to decide whether the defendant on
24 trial before you is guilty or not guilty of any of the
25 charges made against him.

CHARGE OF THE COURT

You are the sole and exclusive judges of the facts. If your recollection of the evidence differs in any way from the recollection of counsel or the Court, your recollection controls and should be relied upon by you. Your judgment as to what the facts are controls. You must approach your duty with complete fairness and impartiality. The Government and this defendant are equally entitled to justice in this court.

The fact that this prosecution is brought up in the name of the United States of America doesn't entitle the Government to any greater consideration than any other litigant would get, but by the same token it is entitled to no less consideration.

The issues in this case must be decided on the evidence and on the law.

Before I turn to the indictment in this case and the charges that are made against the defendant here, let me first give you a few basic principles that should govern you in your deliberations.

Under your oath as jurors you should not and cannot allow sympathy for the defendant or consideration of punishment which he might receive if found guilty to enter into your deliberations or to affect, or influence, your judgment in any way.

CHARGE OF THE COURT

121

19 1 The duty of imposing sentence in the event of
2 a conviction would rest exclusively upon the Court and upon
3 the Court's own conscience.
4

5 During the trial I have been called upon to make
6 rulings from time to time. I have sustained some objections,
7 I have overruled others, and on one or two occasions, I may
8 have ordered testimony stricken and have advised you to
9 disregard it.

10 It is important in the performance of your duties
11 that you limit your consideration of the evidence to that
12 which was actually received in the case and not to give any
13 consideration to any evidence that is stricken.

14 It is equally important that you do not draw
15 inferences against either side because of any objections that
16 counsel may have made or the fact that it may have been neces-
17 sary from time to time to engage in conferences at the side
18 bar or to exclude you from the courtroom altogether.

19 Under our system of justice in this country,
20 it is the function and duty of counsel to object to anything
21 that they think is legally improper, and they would be remiss
22 in their duty if they failed to do so. But it is my function
23 and duty to rule on these questions of law, and I would be
24 remiss in my duty too if I failed to make such rulings even
25 though sometimes they may not have been to the liking of

CHARGE OF THE COURT

122

1
2 counsel for either side.

3 If during the course of the trial from my rulings
4 or questions or facial expressions on some of the questions
5 that I may have put to a witness you get the impression that
6 I personally have any views on the credibility of any of the
7 witnesses or on the weight to be given to their testimony
8 or to the proof or to the merits of the case, please disregard
9 it.

10 It is not my intention to imply or express any
11 opinion or any views to you with respect to the facts in the
12 case or the merits, or the credibility of any witness. That
13 is your sole and exclusive function.

14 Any questions which I may have put to witnesses
15 during the course of the trial have been put to those wit-
16 nesses for purposes of what I hoped was to be clarification
17 of issues which you might ultimately decide. It was not
18 to give you the impression that I was siding one way or
19 another. Whatever my feelings may be in this matter are
20 completely immaterial and irrelevant.

21 No inference is to be drawn from that indictment
22 or from the fact that an indictment has been filed. The
23 grand jury was not asked to determine whether this defendant
24 was guilty or not guilty of the charges contained in the
25 indictment. That is your function as jurors and your function

CHARGE OF THE COURT

123

1
2 alone. Under our law every defendant -- and that is true
3 of the defendant in this case -- is presumed to be innocent.
4 That presumption of innocence is in each defendant's favor
5 throughout the entire trial and even into your deliberations
6 in the jury room.

7 It is overcome only if, as, and when you deter-
8 mine that his guilt has been established beyond a reasonable
9 doubt by the credible evidence in this case.

10 The burden is upon the Government to establish
11 his guilt beyond a reasonable doubt, and that burden applies
12 to each element of the crimes charged against the defendant.
13 That burden never shifts to the defendant. It always remains
14 the Government's right down to the end of the trial.

15 I have mentioned the term "beyond a reasonable
16 doubt." What does that mean?

17 A reasonable doubt means a doubt founded upon
18 reason. As the words imply, it is such a doubt as will be
19 entertained by a reasonable man after all the evidence in the
20 case is carefully analyzed, compared, and weighed. A reason-
21 able doubt may arise not only from the evidence produced,
22 but also from a lack of evidence. Since the burden is upon
23 the Government to prove the defendant guilty beyond a reason-
24 able doubt of every essential element of each crime charged,
25 a defendant has the right to rely upon a failure of the

CHARGE OF THE COURT

124

1 prosecution to establish such proof. However, absolute or
2 mathematical certainty is not required, but there must be
3 such certainty as satisfies your reason and judgment, and
4 such that you feel conscientiously bound to act upon it.
5 It is not a fanciful doubt or a whimsical or capricious doubt,
6 but anything relating to human affairs and depending upon
7 human testimony is open to some possible or imaginary doubt.

8 A reasonable doubt is such doubt as would cause
9 a prudent person to hesitate before acting in matters of
10 importance to himself or herself. In other words, if the
11 evidence warrants, in your judgment, the conclusion that a
12 defendant is guilty so as to exclude every other reasonable
13 conclusion, you should declare him guilty. On the other
14 hand, if on all the evidence you have a reasonable doubt as
15 to the guilt of a defendant, you must find him guilty.

16 Whenever in these instructions I tell you that
17 a certain element must be established before there can be a
18 conviction on a certain count, I mean that this element must
19 be established according to the standard of proof I have just
20 explained -- that is, proof beyond a reasonable doubt. That
21 standard applies to every finding that is essential to a con-
22 viction of the defendant on any count. So if I don't repeat
23 that standard of proof each time, bear in mind that it applies
24 every time I speak to you about an element of the offense or a
25

CHARGE OF THE COURT

125

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2 finding that you are entitled to make. So with respect to
3 all such elements or findings necessary to conviction on any
4 count, I instruct you that you may not conclude that such an
5 element or such a finding is established simply because you
6 may think the weight of the evidence tips somewhat in favor
7 of the Government. The standard of proof is proof beyond
8 a reasonable doubt.

9 The indictment here charges that in two separate
10 incidents the defendant, Santos Petrucelli, endeavored to
11 intimidate an officer and employee of the Internal Revenue
12 Service and to obstruct the administration of the income
13 tax laws, and charges that he did so in violation of a
14 criminal law of the United States, specifically Section 7212
15 (a) of Title 26 of the United States Code.

16 In broad and general terms, the statute I have
17 just mentioned is designed to protect the integrity of the
18 administration of the income tax laws, including, of course,
19 the collection of taxes. As part of this protection of the
20 process of administration of the income tax laws, the
21 statute is designed to prevent improper inference with or
22 influence upon those engaged in the administration of the
23 tax laws, including revenue officers.

24 In addition to protecting the process of collec-
25 tion of taxes, the law is also designed to protect people,

CHARGE OF THE COURT

126

1
2 that is, to protect officers and employees of the Internal
3 Revenue Service from threats of harm made while these persons
4 are engaged in their official duties.

20 5 The sweep of the law extends to any endeavor
6 by threats of force to obtain the improper result. Thus,
7 the key word is "endeavor," which means any attempt, however
8 contrived or useless and whether or not successful, to
9 achieve certain ends by threats of force.

10 Success or failure of an alleged attempt to
11 intimidate an officer or impede the process is not legally
12 material, as I will charge in more detail later, and is not
13 an element of the offense.

14 As I have told you, the defendant is charged with
15 violating Title 26 Section 7212 of the United States Code.
16 The pertinent provisions of this statute read as follows:

17 Whoever by threats of force, including any
18 threatening communication, endeavors to intimidate or impede
19 any officer or employee of the United States acting in an
20 official capacity under Title 26 of the United States Code
21 or in any other way, by threats of force, including any
22 threatening communication, endeavors to obstruct or impede,
23 the due administration of Title 26 of the United States Code
24 commits a crime.

25 Now, the indictment in this case reads as follows:

CHARGE OF THE COURT

127

1
2 At or about the 18th day of March 1976 in the
3 Southern District of New York, Santos Petrucelli, the defen-
4 dant, unlawfully, willfully, and knowingly, and by threats
5 of force, endeavored to intimidate and impede an officer or
6 employee of the United States, to wit, a Revenue Officer
7 of the United States Internal Revenue Service who was acting
8 in an official capacity under Title 26 of the United States
9 Code, and by threats or force endeavored to obstruct and
10 impede the due administration of income tax laws under
11 Title 26 of the United States Code in that Santos Petrucelli,
12 the defendant, in substance, said in a telephone conversation
13 that, "the blacks" were going to get Revenue Officer Joseph
14 Tacopina and asked Revenue Officer Tacopina, in substance,
15 whether he, Mr. Tacopina, would like a punch.

16 That was Count One of the indictment.

17 Count Three of the indictment is as follows:

18 The grand jury further charges on or about the
19 31st day of March 1976, in the Southern District of New York,
20 Santos Petrucelli, the defendant, unlawfully, willfully,
21 and knowingly, and by threats of force, endeavored to intimi-
22 date and impede an officer, an employee, of the United States,
23 to wit, a Revenue Officer of the United States Internal
24 Revenue Service, who was acting in an official capacity under
25 Title 26 of the United States and by threats or force

CHARGE OF THE COURT

128

endeavored to obstruct and impede the due administration of the income tax laws under Title 26 of the United States Code in that Santos Petrucelli, the defendant, in substance, said in a telephone conversation that he carries a gun and that Revenue Officer Tacopina was going to pay with blood for collecting taxes from the defendant.

The statute uses the term "threats of force" which it specifically defines, in parts relevant to this charge to mean threats of bodily harm to the officer or employee of the United States. The statute specifically includes any threatening communication within the definition.

In daily life, not all references to force constitute threats. Some may simply be rhetorical or overstatement, which under the circumstances could not possibly put someone in actual fear. On the other hand, acts or statements constitute an actual threat if they instill fear in the person to whom they are directed or if they are reasonably calculated, in light of the surrounding circumstances, to instill fear in the person to whom they are directed or in an ordinary person. In this regard, you may consider that words harmless in themselves may take on a sinister and threatening meaning in the context in which they are used; on the other hand, you may decide that the words that the Government contends were used by the defendant,

CHARGE OF THE COURT

129

1
2 in their circumstances and full context, carried no threaten-
3 ing significance.

4 In evaluating whether there threats of force
5 in any of the counts charged, you should take into considera-
6 tion all of the evidence in this case bearing on what the
7 person making the allegedly threatening remark intended
8 by the remark, as well as the manner in which the statements
9 were made. If you find that the defendant made a particular
10 remark, in order to determine whether that remark was
11 threatening you may consider, among other surrounding circum-
12 stances what, if anything, the defendant knew about the person
13 at whom the remark was directed.

14 In the context of this case, if you find that
15 the defendant made the tape-recorded remarks, in order then
16 to determine whether those remarks constituted threats of
17 force, you may consider what, if anything, the defendant
18 believed that Tacopina, or any other person at whom the
19 remarks were directed, knew about him. If you find the
20 defendant made an anonymous call, you may consider whether
21 the defendant's failure to identify himself has any signifi-
22 cance in determining if that anonymous remark was threatening.

23 The evidence in this case raises the question
24 of whether the defendant was in fact the individual who made
25 the telephone call to Mr. Tacopina and this necessitates your

CHARGE OF THE COURT

130

1
2 resolving any conflict or uncertainty in testimony on that
3 issue.

4 The burden of proof is on the Government to prove
5 beyond a reasonable doubt the identity of the defendant as
6 the person who made the telephone call. You are not bound
7 by a witness's identification of the disputed voice. You
8 may reject the witness's opinion if after careful considera-
9 tion of all the evidence in the case you disagree with the
10 opinion. You must find that the Government has proved
11 beyond a reasonable doubt that the defendant, Mr. Petrucelli,
12 was the individual who made the telephone call to Mr. Taco-
13 pina.

14 I further charge you that if you determine beyond
15 a reasonable doubt that the defendant made a threatening
16 remark, in order to convict the defendant you need not find
17 that the defendant actually intended to carry out that threat.
18 Nor must you find that the threat was made directly to the
19 person who was the target of the threat. You also need not
20 find that the threat was that the defendant himself would
21 use force. It is sufficient if the threat is that someone
22 else will use force against the person who is threatened.

23 The next word to define is "endeavors," which,
24 as used in this law, means to try, or means any effort, at-
25 tempt, or act, however contrived or futile, to accomplish a

CHARGE OF THE COURT

131

1
2 result.

3 Title 26 of the United States Code is the compila-
4 tion or gathering together of many provisions dealing with
5 the income tax laws, including, among other things, sections
6 that establish rules governing deductions a taxpayer can
7 take, what is considered taxable income, what penalties a
8 person must pay if he hasn't paid as much tax as the Govern-
9 ment says a person owes, procedures to dispute or appeal
10 what a Government employee says is the amount of tax owed,
11 and means for the collection of taxes owed but not paid.

12 The due administration of Title 26 then refers
13 to the fair, impartial, uncorrupted and unimpeded operation
14 of these sections, and the operation and functioning of the
15 Government employees, officers, and staffs who carry out and
16 oversee the operation of the tax laws. This due administra-
17 tion covers every step or action within the I.R.S. in a
18 particular tax matter and in all tax matters.

19 To impede or obstruct the due administration
20 just described, means to interfere with or block any step,
21 requirement, or process in effectuating the due administra-
22 tion.

23 The word "intimidate" as used in the statute
24 simply means to make timid or fearful or to arouse or inspire
25 or instill fear in another.

CHARGE OF THE COURT

132

1
2 When reference is made to acting in an official
3 capacity, all that is meant is that a Government officer
4 or employee is engaged in his ordinary or usual duties
5 rather than being off on private business. In the context
6 of this case, to find that something was done to someone
7 acting in an official capacity under Title 26, you must
8 find that it was done to that person in connection with his
9 duties and employment as an employee or officer of the Inter-
10 nal Revenue Service.

11 Now we get down to the elements of the offense.

12 With respect to each of the two counts in the
13 indictment, before you may convict the defendant you must be
14 satisfied beyond a reasonable doubt as to the particular
15 count you are considering.

16 First: that the defendant used threats of force.

17 Second: by using threats of force, the defendant
18 endeavored to intimidate or impede an officer or employee
19 of the United States acting in his official capacity with
20 respect to the income tax laws or in any way by threats of
21 force endeavored to obstruct or impede the due administration
22 of the provisions governing the income tax laws. As to
23 this particular element it is sufficient if you find beyond
24 a reasonable doubt that the defendant endeavored to do either
25 of the two things I just described. You need not find that

CHARGE OF THE COURT

133

1 he endeavored to do both.

2 Third: that the defendant's acts were done know-
3 ingly, willfully, and intentionally.

4 Fourth: that the crime charged was committed
5 in the Southern District of New York. If, as here, the crime
6 is charged to have been committed by a telephone call, I
7 charge you that it is committed both in the place where the
8 call is made and where the call is received.

9 I further charge you that as a matter of law
10 the Internal Revenue Service buildings at 120 Church Street
11 and 26 Federal Plaza in Manhattan are in the Southern District
12 of New York. Therefore, if you find that a call has been
13 made either to or from the Internal Revenue buildings then
14 it has taken place in the Southern District of New York.

15 As to each of the two counts, in order to convict
16 on the count being considered you must find, as part of what
17 I just have told you are the required findings, that the
18 defendant was a party to the telephone call charged in that
19 count, and that by his words and deeds the defendant specifi-
20 cally intended and endeavored either to intimidate or impede
21 an I.R.S. officer or employee, or to obstruct or impede the
22 due administration of the tax laws.

23 Intention can be proved by direct evidence or
24 circumstantially or by inference, so long as it is proved
25

CHARGE OF THE COURT

134

1
2 beyond a reasonable doubt. If you find that the defendant
3 had a particular telephone conversation as charged, but that
4 he did not intend by that conversation to intimidate, instruct
5 or impede as I have described, then the defendant cannot be
6 convicted.

7 On the other hand, if you find beyond a reason-
8 able doubt that a threatening call was made with the specific
9 intent to intimidate, instruct, or impede, as I have described,
10 and if you also find beyond a reasonable doubt that the
11 other essential elements to which I have referred, then you
12 have enough upon which to reach a verdict of guilty.

13 Moreover, in order to convict the defendant,
14 you need not find that the person alleged to be the object
15 of a threatening communication actually feels threatened or
16 in physical danger.

17 As I indicated to you earlier, as to all of the
18 counts charged in the indictment, the Government must prove
19 beyond a reasonable doubt that the defendant acted willfully
20 and knowingly; that is, that the defendant knew what he was
21 doing and that he did it deliberately and voluntarily, as
22 opposed to mistakenly or accidentally or as a result of some
23 coercion. An act is willful if it is done knowingly, de-
24 liberately, and with a bad motive or purpose. Of course,
25 it is not necessary that the defendant knew he was violating

CHARGE OF THE COURT

135

any particular law.

Knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, the only way you have for arriving at a decision on these questions is for you to take into consideration all the facts and surrounding circumstances shown by the evidence, including, of course, the exhibits and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances, including, for example, attempts to hide the identity of a person making a phone call. Another example is that from the fact that a person's signature appears on a document you may infer that he has knowledge of its contents.

You have heard testimony by Internal Revenue Service Inspector Danny Webb that the defendant made a statement shortly after he was arrested. If you find that the defendant did make the statement then you may give the statement such weight as you believe it deserves after considering all the circumstances which were brought out in the evidence.

The Government has presented evidence during this trial which was derived from a telephone conversation to which one party had consented that it be recorded, namely,

CHARGE OF THE COURT

Inspector Santiago.

As you know, this is different from a wiretap in which a third party listens in and records a telephone conversation to which he is not a party. The laws which govern the legality of recordings and wiretapes are designed to protect the right of privacy, which Mr. Santiago could voluntarily give up as to this conversation. With respect to the evidence in this trial which has been the product of the recorded conversation, I have found that the recording was conducted according to the law. Thus, you may not question during your deliberations whether or not that particular evidence before you was legally obtained. This is a question for the consideration of the Court alone. On the other hand, you obviously may, and must, consider whether the defendant was the other party to the conversation, and, if he was, what he meant by his remarks.

Now, in performing your function, one of the most important things you have to do is to pass upon this matter of credibility, that is, the believability of the various witnesses who have appeared before you. In passing on the credibility of each of the witnesses there are certain considerations you may well have in mind. One of these is the appearance which the witness made when he was on the stand. You should try to "size him up." Did he appear to be

CHARGE OF THE COURT

137

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2 telling the truth? Did he appear to be honest? Did he
3 appear to be intelligent? Did he appear to be a person who
4 could have observed accurately what he is telling you about,
5 who would be likely to have remembered it accurately and who
6 is capable of reporting it to you accurately?

7 Another question for you to have in mind regard-
8 ing each witness is the question as to whether the story he
9 has told you is plausible. Does it ring true or are there
10 inconsistencies in it? How does it fit in with the other
11 evidence in the case which you do believe and other facts
12 you find to have existed? Does it jibe with that evidence
13 and those facts? In short, does the testimony which was
14 given by the particular witness whose credibility you are
15 considering seem to you to be plausible?

16 Another question you may well ask yourself in
17 passing on the credibility of any witness is whether that
18 witness has any bias or interest in the outcome of the case,
19 and, if so, whether he has permitted that bias or interest
20 to color his testimony. It, of course, does not follow
21 simply from the fact that a witness does have a bias or
22 does have an interest in the outcome of the case that his
23 testimony is to be disbelieved.

24 In considering the testimony of Government wit-
25 nesses you should bear in mind that their testimony is entitled

CHARGE OF THE COURT

138

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to no greater significance simply because they are employees of the Government. Their testimony should be subject to the same considerations you apply to any witness, regardless of their employment by the Government.

The law does not compel a defendant to take the witness stand to testify and no unfavorable inference of any sort may be drawn from the fact that a defendant chooses not to testify.

You must not permit such a fact to weigh in the slightest degree against the defendant, nor should it enter into your discussions or deliberations. A defendant is not required to establish his innocence; he need not produce any evidence whatsoever if he does not choose to do so, and there cannot be any adverse inference drawn from a defendant's failure to produce evidence.

As I have indicated, the burden is on the Government to prove a defendant guilty beyond a reasonable doubt; if it fails, a defendant has the right to rely on that failure and, of right, must be acquitted.

Evidence is of two types, direct evidence and circumstantial evidence.

Direct evidence is where a witness testified to what he saw, heard, observed, what he knows of his own knowledge, or something that comes to him by virtue of his

CHARGE OF THE COURT

139

senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connective facts which reasonably follow in the experience of mankind. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is no less valued than direct evidence because in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant.

Let us take one simple example, one often used to illustrate what is meant by circumstantial evidence.

We will assume that when you entered the court house this morning the sun was shining brightly outside and it was a clear day; there was no rain and the sky was clear. Assume that in this courtroom the blinds were drawn and the drapes were drawn so that you could not look outside. Assume as you are sitting in the jury box and despite that it was dry when you entered the building, somebody walks in with an umbrella dripping water and is followed in a short while by a man with a raincoat which is wet. Now, on our assumptions that you cannot look out of the courtroom and see

CHARGE OF THE COURT

140

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whether it is raining or not, and if you were asked, "Is it raining?" you cannot say you know it directly or from your own observation, but certainly upon the combination of facts and given that when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is now raining outside.

That is about all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some further fact.

There are times when different inferences may be drawn from facts, whether they are proved by direct or circumstantial evidence.

The Government asks you to draw one set of inferences while the defendant asks you to draw another. It is for you to decide, and for you alone, what inferences you will draw.

In conclusion, the purpose of your deliberations is to exchange views with your fellow jurors, to discuss and consider the evidence, to listen to each other's arguments, to present your own views, and to reach a unanimous verdict based solely and wholly on the evidence if you can do so without violence to your own individual conscience and judgment.

Each of you must decide the case for yourselves

CHARGE OF THE COURT

141

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2 but do so only after impartial consideration of the evidence
3 in the case with your fellow jurors.

4 Do not hesitate to re-examine your views and
5 to change your opinions when after a discussion it appears
6 to be in error.

7 But if after carefully weighing all the evidence
8 in the case and the arguments of your fellow jurors you hold
9 a conscientious view which differs from the others, you are
10 not to yield your view simply because you are outnumbered.
11 Your final vote must reflect your objective and deeply thought
12 out determination of the issues.

13 If, in the course of your deliberations, you desire
14 any portion of the testimony to be read back, or to hear any
15 portion of the tape again, you may send in a note to the
16 Court asking for whatever will clear up any of the questions
17 you may have.

18 This is a caveat, an admonition that I must ask
19 of you: when you do have a question, you should be very
20 specific about that question. If you are specific, we can
21 find it more easily in the testimony which has been given
22 or in the tape which you have heard.

23 In communicating with the Court I should admonish
24 you that you should never indicate how your vote may then
25 be divided. The reason for that is simple: your delibera-

CHARGE OF THE COURT

142

1 tions are secret and it would be a breach of that secrecy
2 to communicate how the jury has voted at any time except
3 to announce that you have reached a unanimous verdict.
4

5 In the event you members cannot agree unanimously
6 upon a verdict after due deliberation, do not indicate to
7 anyone, including the Court, how the jury has voted or why
8 you cannot agree unanimously upon a verdict; merely indicate
9 that you consider yourselves to be deadlocked.

10 If I should ask you any questions in court during
11 the course of your deliberations, pause before you answer
12 and carefully consider my question. If the answer calls for
13 a yes, no, or maybe reply, give only the reply to my question
14 and do not volunteer any additional statements. In any event,
15 do not say any more than is necessary to inform me of your
16 answer.

17 When you indicate that you have reached a verdict,
18 do not indicate what your verdict is. You will be asked
19 to state that orally through your forelady in open court.

20 I will conclude by simply saying your oath sums
21 up your duty, and that is, without fear or favor to anyone
22 you will well and truly try the issues between the defendant
23 and the Government of the United States based solely upon the
24 evidence which has been introduced and the Court's instructions
25 as to the law.

CHARGE OF THE COURT

143

Remember, you must consider each count and make a decision with respect to each verdict.

Your verdict, whether it be guilty or not guilty, must be unanimous.

This case is important to the government and it is important to the defendant. Give it your faithful consideration.

I now ask that the marshalls be sworn.

(Marshalls sworn)

MR. JACOBS: Your Honor, may we have a side bar.

(At the side bar)

MR. JACOBS: One minute, your Honor, With regard to inferences I believe your Honor should tell the jury that if they reach a conclusion that a piece of evidence is subject to two inferences, one which is innocent and one which is not innocent, they must accept the innocent one.

THE COURT: It only applies in the courts of the State of New York and not in the Federal courts.

MISS NEUGARTEN: I would appreciate it if you could inform the jury they should return a separate verdict as to each count.

THE COURT: That's what I did.

MISS NEUGARTEN: All right.

MR. JACOBS: That's all I have.

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